Supreme Court, U.S.
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NO. 92-1032

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

BENASA REALTY COMPANY, t/a Wild Acres t/a Wild Acres Country Club t/a Wild Acres Inc.; BENASA REALTY COMPANY, c/o First Eastern Bank, N.A.; BENASA INVESTMENTS, INC., c/o Corporation Guarantee and Trust Company; WILD ACRES COUNTRY CLUB, INC.; and WILD ACRES LAKES PROPERTY & HOMEOWNERS ASSOC.

Petitioners

v.

DENNIS MOONEY, MLA MANAGEMENT ASSOCIATES, INC. and MOUNTAIN LEISURE ASSOCIATES,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

At trial, petitioner-defendants and their co-defendants contended and provided powerful, convincing evidence that respondent-plaintiff rendered himself a permanent quadriplegic when he executed a running, not a racing, dive contrary to his training and experience that produced his injury when his head violently contacted the bottom of the pool.[1] Plaintiff contended, in the alternative, that liability for the permanent quadriplegia consequent to the dive, which he insisted was a shallow

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[1]Page 5 of respondent-plaintiff's brief in opposition improperly resurrects his attacks against the qualifications and testimony of the defense expert, Dr. Kazarian, which the District Court properly rejected (Appendix to Petition, 69-77), and which plaintiff did not raise in his appeal to the Court of Appeals.

racing dive,[2] rested solely with the defendants because of their negligence in maintaining or marking the pool's water depth, or that the fracture upon contact with the bottom of the pool produced only an incomplete quadriplegia which was aggravated to a complete quadriplegia during the defendant's rescue without using a spine board. The District Court refused to preclude plaintiff's alternative permanency-upon-negligent-rescue claim and allowed all of the parties' contentions to be presented to and decided by the jury (Appendix to Petition, 221-228). Plaintiff argued both aspects of his alternative claims to the jury (215-220). The jury, however, found that the defendants proved by "the

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[2]The evidence underscored that plaintiff would not have hit the bottom of the pool if he had done a shallow racing dive.

fair weight and preponderance of the evidence that the act of diving into the pool involved in this case is one that involves a risk of danger to anyone who engages in that act" and that plaintiff "knowingly assumed such a risk" (43-44).

What the plaintiff's brief in opposition and the Court of Appeals opinion erroneously overlook is that the parties' contentions and the structure of the District Court's special interrogatories posited this threshold factual issue that the jury necessarily resolved in the defendants' favor: did plaintiff's permanent quadriplegia occur when his head hit the bottom of the pool or did it occur when he was being rescued afterwards? In order to conclude that defendants had proven that the "act of diving" involved that risk and that plaintiff had assumed that risk, the jury

had first to find that plaintiff's permanent quadriplegia was caused by his dive and not by the subsequent rescue. If the jury had adopted plaintiff's contentions, it would have answered the two assumption of the risk interrogatories in the negative. That verdict, which the jury did not return, would have required the jury to reject defendants' claim that plaintiff's permanent quadriplegia was caused by the dive and to accept plaintiff's claim that his permanent quadriplegia was not caused by the dive but by the subsequent rescue.

While the Court of Appeals correctly rejected plaintiff's appeal for "a new trial on liability for the dive because of the erroneous readings of the depositions" (30-31), the Court of Appeals exceeded the scope of its appellate powers and violated the

strictures of the Seventh Amendment and this Honorable Court's decision in Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, 369 U.S. 355 (1962), by remanding for a new trial on plaintiff's negligent rescue claim. What plaintiff's brief in opposition and the Court of Appeals opinion erroneously overlook in this regard is that this mandate negates the jury's verdict which placed responsibility for plaintiff's permanent quadriplegia upon plaintiff and which found that this injury was caused by plaintiff's risk-assuming dive and not by the subsequent rescue. The Seventh Amendment and Atlantic & Gulf Stevedores simply do not permit such a fundamentally contradictory re-examination of the facts determined by the jury's verdict.

What plaintiff's brief in opposition and the Court of Appeals opinion also

erroneously overlook is that the new trial mandate compounds this fundamental constitutional error by compelling a new trial, at which the likely verdict is one in favor of plaintiff in contradiction of the verdict originally rendered for defendants,[3] on the basis of legal principles squarely at odds with controlling state law in contravention of the Rules of Decision Act, 28 U.S.C. Section 1652, and Erie Railroad v. Tompkins, 304 U.S. 64 (1938).

On the one hand, shifting the burden of proving apportionment from the party who advocated two apportionable injuries to the parties who did not argue

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[3]In the view of the Court of Appeals opinion, once plaintiff demonstrates two separate injuries, "the burden shifts to the defendants to avoid full liability by apportioning damages and showing that they are responsible only for a given portion of plaintiff's damages....to show which defendants had caused what percentage of Mooney's injuries" (23-24).

apportionment but rather advocated a single, complete injury which was the plaintiff's sole responsibility, runs directly counter to the controlling legal principal that "the burden of proving apportionment rests upon the party seeking it", Martin v. Owens-Corning Fiberglas Corp., 545 Pa. 377, 528 A.2d 947, 949 (1987); Borman v. Raymark Industries, Inc., 960 F.2d 327, 331 (3rd Cir. 1992); see also, Bryant v. Girard Bank, 358 Pa. Super. 335, 517 A.2d 968, 975 (1986); Wade v. S.J. Groves, 283 Pa. Super. 464, 424 A.2d 907, n.2 at 907 (1981).

In Martin, which the Court of Appeals opinion cites, and in Borman, which that opinion does not cite even though known to and specially briefed at the Panel's request, the defendants advocated apportionment, but the courts

refused to allow the juries to consider the claim because the evidence was insufficient to allow apportionment, even though the evidence revealed two causes of the claimed injuries. Contrary to the view presented on pages 11-12 of plaintiff's brief in opposition, those cases do not place the burden of proving apportionment always upon the defendant, nor do they hold that the advocate of apportionment satisfies his "burden of proof" simply by showing the existence of two harms. Rather, the burden was placed upon the defendants in those cases simply because they were the parties seeking apportionment, and the juries were not allowed to provide the claimed apportionment because the advocates failed to adduce sufficient evidence to permit the jury to make the apportionment.

Proof that this analysis, rather than that advanced by plaintiff's brief in opposition and the Court of Appeals opinion, is correct can be found in the Opinion of the Court in Martin. That opinion drew upon the court's earlier opinion in Offensend v. Atlantic Refining Co., 322 Pa. 399, 185 A.2d 745 (1936), to formulate, 528 A.2d at 949, and to apply, 528 A.2d at 950, the controlling apportionment principles. As revealed in the quote from Martin at pages 13-14, infra, the Court in Offensend reduced a plaintiff's aggravation award because the expert testimony as to the duration of the aggravation of the pre-existing tubercular condition claimed by plaintiff was insufficient to support the jury's verdict.

Had the Court of Appeals in this case honored its mandate under the Rules

of Decision Act and Erie v. Tompkins, it would have followed Martin and Borman by placing the burden of proving apportionment upon plaintiff, the only party in this case to advocate apportionment. The Court of Appeals exceeded its appellate powers by imposing that burden upon the defendants.

On the other hand, both plaintiff's brief in opposition and the Court of Appeals opinion erroneously fail to recognize that Dr. Kaplan's testimony, as actually provided in the District Court (92-214), rather than as misinterpreted and refashioned by plaintiff and the Panel, falls far short of the required evidence to sustain plaintiff's burden of proving his claim that the impact with the pool produced only a temporary, fully curable injury that was aggravated to a complete, permanent quadriplegia during

the subsequent rescue.

The details of Dr. Kaplan's testimony are accurately delineated at pages 24-34 of the Petition for Writ of Certiorari, and are incorporated here by reference. At this juncture it should be sufficient to note that, first, neither the brief in opposition nor the Court of Appeals opinion provide record page references for their assertion that Dr. Kaplan described two distinct injuries: a compression injury from the dive, and a flexion injury from the rescue (Brief in Opposition, p. 11; Opinion, Appendix to Petition, p. 19), and none can be provided because these statements simply misinterpret what Dr. Kaplan described as the two forces generated simultaneously when plaintiff's head hit the bottom of the pool (112). Second, it is to be noted that Dr. Kaplan testified that it

is "very difficult to predict" the future of an incomplete spinal injury, that the "function can be anything from partial to complete recovery", and that "each case then becomes an individual matter" (116), and that Dr. Kaplan did not explain whether plaintiff's theoretical incomplete injury would have resulted in a partial or a full recovery, or to what degree plaintiff would have remained disabled had a spine board been used. Finally, as to Dr. Kaplan's delineation of damages, it should be noted that his testimony was couched in speculative terms: "I don't know if I could separate that, what -- the medication usage, it could be the same" (160), "It's really hard to say what job he might want and how much help he might need" (162).

Had the Court of Appeals abided by its duties to accurately review the

record and to follow controlling law, it would have found Dr. Kaplan's evidence as insufficient to allow the jury to make the apportionment advocated by plaintiff as the evidence found insufficient in Martin, supra, 528 A.2d at 950 (footnotes omitted):

> The jury, although presented with a great deal of testimony concerning appellant's history and physical condition, was provided no guidance in determining the relative contributions of asbestos exposure and cigarette smoking to appellant's disability. In fact, two experts testified that such a determination was not possible. A situation analogous to the instant case arose in Offensend v. Atlantic Refining Co., supra. There, a jury award of damages for aggravation of an existing tubercular condition was modified (reduced), because the expert testimony did not address the duration of the aggravation. "If the doctors were not in a position to make an estimate of the extent of the aggravation in point of time, the jury should have been allowed to hazard a guess

> beyond the period shown with reasonable certainty." Id., 322 Pa. at 404, 185 A.2d 745. Here, as in Offensend, the jury cannot be expected to draw conclusions which medical experts, relying on the same evidence, could not draw. The causes of disability in this case do not lend themselves to separation by lay-persons on any reasonable basis. Thus, common sense and common experience possessed by a jury do not serve as substitutes for expert guidance, and it follows that any apportionment by the jury in this case was a result of speculation and conjecture and hence, improper. "Rough approximation" is no substitute for justice.

Dr. Kaplan's speculations cannot be regarded as a proper basis for the jury verdict sought by plaintiff.

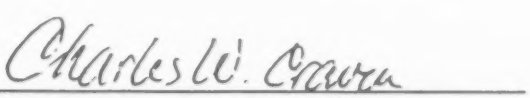
Having chosen to litigate his claims in the federal court system, plaintiff should not now be heard to defer this Honorable Court from exercising its power and fulfilling its duty to ensure that the Court of Appeals comply with federal rights, simply by belittling this case as

a diversity case. Even in a diversity case, a federal appellate court should not be permitted to disregard the rights conferred by the Seventh Amendment, the Rules of Decision Act, Atlantic & Gulf Stevedores, and Erie. Because the Court of Appeals transgressed those rights and exceeded its appellate powers, intervention by this Honorable Court is necessary.

CONCLUSION

For these reasons and those delineated in their petition for writ of certiorari, petitioners respectfully request that this Honorable Court grant the petition, reverse the decision of the Court of Appeals granting a new trial, and reinstate the jury's verdict and the District Court's judgment.

Respectfully submitted,



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